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No. 10-

IN THE
# Supreme Court of the United States

WILLIAM S. MACDONALD,
*Petitioner*,

*v.*

GENE M. JOHNSON,
Director, Virginia Department of Corrections,
*Respondent*.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the Court of Appeals erred in denying a certificate of appealability under 28 U.S.C. § 2253 on a claim that Virginia's sodomy statute violates the Due Process Clause as explained in *Lawrence v. Texas*, 539 U.S. 558 (2003).

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## PETITION FOR WRIT OF CERTIORARI

William S. MacDonald respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unreported but can be found at 384 Fed. Appx. 273. App. 1a. The opinion of the United States District Court for the Eastern District of Virginia is unreported. App. 2a.

The Virginia Supreme Court's decision on direct appeal is published and can be found at *McDonald* (sic) *v. Commonwealth*, 645 S.E.2d 918 (Va. 2007). App. 14a. The Virginia Court of Appeals' decision on direct appeal is also published and can be found at *McDonald* (sic) *v. Commonwealth*, 630 S.E.2d 754 (Va. Ct. App. 2006). App. 27a.

## JURISDICTION

The Fourth Circuit Court filed its opinion on June 24, 2010 and denied a timely petition for rehearing on July 27, 2010. This Court granted an extension of time to file the petition for writ of certiorari to December 23, 2010. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides that no State "[s]hall * * *

deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Virginia Code § 18.2-361(A) provides that "[i]f any person carnally knows * * * any male or female person by the anus or by or with the mouth, or voluntarily submits to such carnal knowledge, he or she shall be guilty of a Class 6 felony * * * *"

## STATEMENT

In *Lawrence v. Texas*, this Court declared a Texas statute prohibiting same-sex sodomy unconstitutional under the Due Process Clause of the Fourteenth Amendment, recognizing that individuals' "right to liberty under the Due Process Clause" includes the freedom to engage in private, consensual sexual conduct. 539 U.S. 558, 578 (2003).

After the Court decided *Lawrence*, it was widely acknowledged that the decision also invalidated sodomy statutes in the twelve other states that had them. For example, several state Attorneys General – including Virginia's – stated that they believed their states' respective sodomy statutes were no longer enforceable. *See* Charles Lane, *Justices Overturn Texas Sodomy Ban; Ruling Is Landmark Victory for Gay Rights*, Wash. Post, June 27, 2003, at A1 ("Virginia Attorney General Jerry W. Kilgore (R) expressed disappointment with the ruling, which he said invalidates a state statute banning oral and anal sex between consenting gay and heterosexual couples."); Elizabeth Neff, *Laws on Consensual Sodomy, Premarital Sex Targets of Suit*, Salt Lake Trib., July 17, 2003, at C3 ("Utah Attorney General

Mark Shurtleff readily admits a U.S. Supreme Court ruling issued last month has already nullified both [sodomy and premarital sex laws]."). Scholars noted this as well. *See, e.g.*, David H. Gans, *Strategic Facial Challenges*, 85 B.U.L. Rev. 1333, 1380 (2005) ("[T]he Court invalidated the Texas law on its face, rather than only as applied to the defendants challenging the statute."); Roger Pilon, *Facial v. As-Applied Challenges: Does It Matter?*, 2008-09 Cato Sup. Ct. Rev. vii, x (2008-09) ("[T]he Court upheld a facial challenge to a state statute" in *Lawrence* because "[n]o set of circumstances could justify the law.").

Virginia, however, has since chosen to disregard *Lawrence*'s apparent invalidation of all sodomy statutes and continues to sporadically enforce its sodomy statute. Even worse, the court below countenanced Virginia's inconsistent and unconstitutional application of the sodomy statute by refusing to review it, despite the statutory command to do so when a defendant makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Because the lower courts decided and failed to decide a significant federal question in a way that conflicts with this Court's decisions, the Court should grant review.

Virginia's sodomy statute prohibits an extremely broad swath of conduct, including the commission of oral or anal sex with any person, regardless of age, sex, or marital status. Va. Code § 18.2-361(A). The statute is not limited to public or forced sexual acts; indeed, on its face it applies equally to acts occurring in the home between consenting adults.

Here, Virginia convicted Petitioner William MacDonald, who is over the age of 18, on four counts of sodomy for having oral sex with a 16-year-old and a 17-year-old – even though this conduct would have been legal but for the general sodomy statute.

At Mr. MacDonald's bench trial, his counsel argued that prosecution under the statute violated the Due Process Clause:

> My argument would be you have testimony from these two girls they consented, they were not forced, they were not threatened, they were not paid. These were not public acts, they were private, concealed from other people. My argument would be that I believe that the age of consent in Virginia would be sixteen * * * * And so what I would argue is that because they are of the age of consent and they're old enough to give that consent, there is no crime here, and to punish him would be in violation of the due-process clause of the 14th Amendment, just taking the Commonwealth at its evidence.

App. 17a-18a.

The trial court denied Mr. MacDonald's motion to dismiss, stating: "I don't find that the due-process clause or the case that you cite would abrogate the law as it relates to juveniles and the code section that they're charged under, and I don't find any constitutional violation." App. 19a. Mr. MacDonald was then convicted, though the court made no

finding that the other parties to the acts were forced, threatened, or paid to participate in the acts.

The trial court imposed a prison sentence of five years for each of the four counts, with four of the years suspended on the first three counts and all five years suspended on the fourth count. As a result of his conviction for the sodomy offenses, Petitioner was required to register as a sex offender, which places severe restrictions on his ability to find housing or employment.[1] *See* Va. Code § 9.1-902.

On direct appeal, the Virginia Court of Appeals stated that a facial challenge to the law was inappropriate but nonetheless added that "nothing in *Lawrence* * * * facially invalidates [the sodomy statute]." App. 33a.

The court also rejected Mr. MacDonald's as-applied challenge, in which he argued that his conviction was unconstitutional under *Lawrence* because all parties involved in his alleged offense were above Virginia's age of consent and therefore under *Lawrence*'s protection. The appellate court acknowledged that the sodomy statute does not contain an age element but rather "serves to outlaw the behavior at issue in this case between any parties, regardless of age or consent," and also acknowledged that Virginia generally allows for people age 15 to 17 to consent to sexual intercourse. App. 34a. Nevertheless, the court concluded that 16-

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[1] Indeed, despite a 17-year career in the Marine Corps, an additional 18 years of service in the National Guard, and years of service as a volunteer firefighter, Mr. MacDonald's career prospects have been destroyed, and he and his wife face high obstacles to even finding a place to live.

and 17-year-olds are not "adults" under state law and thus held that the liberty to engage in private sexual conduct described in *Lawrence* does not protect the parties' conduct in this case. App. 35a-36a.

Mr. MacDonald then appealed to the Virginia Supreme Court, which began its opinion by stating that it was "consider[ing] a constitutional challenge to Va. Code § 18.2-361 prohibiting sodomy." App. 16a. Like the intermediate appellate court, the Virginia Supreme Court focused on the age of the participants and concluded that the statute did not violate the Due Process Clause. App. 25a-27a. Although Mr. MacDonald had challenged the statute under the Due Process Clause and *Lawrence* before the trial court and the lower appellate court, the Virginia Supreme Court nonetheless held that Petitioner had failed to preserve a facial challenge. App. 26a-27a.

The court considered and rejected Mr. MacDonald's as-applied challenge because, in the court's view, "(1) the sodomy statute stands alone and without age restrictions concerning consent in this case, and (2) the real issue in this case is the victims' legal status as minors." App. 27a. With regard to the first point, the court concluded that because the sodomy statute contains no age restriction, the court could limit the law's application to cases in which a party is under the age of consent, as "such matters are for legislative consideration * * * *" App. 28a. The court also noted that the Virginia Code elsewhere defines an adult as someone 18 years or older and defines a child as someone under 18. App. 28a. *See* Va. Code §§ 1-203, 1-204, 1-207.

Although the court admitted that the sodomy statute contains no age restriction, it nonetheless decided that it could "construe the plain language of [the] statute to have limited application if such a construction will tailor the statute to a constitutional fit." App. 29a (marks and citation omitted). It did so by holding that the general sodomy statute could be constitutionally applied to prohibit sodomy for persons over the age of 15, even though 15 is the age of consent in Virginia. App. 29a.

Mr. MacDonald's state post-conviction motion, again challenging the constitutionality of the statute under *Lawrence*, was denied by the trial court and, without comment, by the Virginia Supreme Court.

Next, Mr. MacDonald sought habeas relief in the federal district court under 28 U.S.C. § 2254, again arguing that the state sodomy statute is unconstitutional. The District Court rejected the claim on the merits:

> The [Virginia] Court of Appeals' determination is based on clearly established federal law. As the court noted, Virginia considers persons aged sixteen and seventeen to be children, and the Supreme Court in *Lawrence* explicitly stated that the ruling did not apply to sexual acts involving children. *McDonald*, R. No. 1180-05-2 (citing *Lawrence*, 539 U.S. at 578). Thus, as the Court of Appeals of Virginia found, the statute is not unconstitutional as applied to MacDonald, and Claim 3 fails.

App. 14a.

The District Court denied Petitioner a certificate of appealability ("COA"), as did the Fourth Circuit Court of Appeals, which concluded that Petitioner had "not made the requisite showing" of a "debatable claim of the denial of a constitutional right." App. 2a.

This petition seeks review of the Court of Appeals' refusal to consider Mr. MacDonald's argument that Virginia's sodomy statute is unconstitutional, both facially and as applied to him.

## REASONS FOR GRANTING THE WRIT

*Lawrence v. Texas* established that state governments cannot interfere with individuals' private, consensual, non-commercial sexual conduct. The Court therefore struck down Texas's statute prohibiting same-sex sodomy and reversed its decision in *Bowers v. Hardwick*, which had upheld Georgia's statute prohibiting all sodomy.

Despite *Lawrence*, the Commonwealth of Virginia has continued to prosecute people under its sodomy statute – which includes a blanket prohibition on all oral and anal intercourse – for acts that are not otherwise illegal. Here, the state convicted Mr. MacDonald of sodomy – and branded him a "sex offender" – for acts of consensual oral sex with a 16-year-old and a 17-year-old, even though those acts did not violate the state's laws against statutory rape, forcible sodomy, or corruption of a minor.

Mr. MacDonald argues that Virginia's law is facially invalid in light of *Lawrence*, rendering his conviction unconstitutional – but the Court of

Appeals refused to even grant a certificate of appealability to consider this claim.

Mr. MacDonald therefore asks this Court to address this important issue by either accepting this case for plenary review or remanding it to the Court of Appeals for the consideration it deserves.

## I. The lower courts erred in denying a certificate of appealability because Virginia's sodomy statute is unconstitutional under *Lawrence v. Texas*.

The lower courts erred in denying Mr. MacDonald a certificate of appealability ("COA") because substantial arguments support his claim that Virginia's sodomy statute is unconstitutional under *Lawrence v. Texas*, 539 U.S. 558 (2003).

To be entitled to a COA, Mr. MacDonald needed to show only "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Mr. MacDonald has satisfied this requirement because he can show not only that reasonable jurists could disagree with the District Court's conclusions but also that his position is correct.

### A. *Lawrence* invalidated all state sodomy laws, including Virginia's.

#### 1. *Lawrence* found Texas's sodomy statute facially unconstitutional.

In *Lawrence*, this Court facially invalidated Texas's same-sex sodomy statute because it violated individuals' right under the Due Process Clause to engage in private, consensual, non-commercial sexual activity.

The Texas statute's problem was not merely that it discriminated against homosexuals. Indeed, the Court specifically declined to decide the case on Equal Protection grounds because to do so might lead some to question – wrongly – "whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex partners." *Lawrence*, 539 U.S. at 575. Moreover, the Court recognized that striking down only the portion of the law limiting its application to activities between members of the same sex could still cause collateral harm to homosexuals: "If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons." *Id.* Thus, the Court made clear that it intended to take the Texas statute and all general sodomy statutes off the books.

In addition, the Court's language in general indicates that it intended nothing less than facial invalidation of the statute. At the outset, the Court stated that the issue before the Court was "*the validity of a Texas statute* making it a crime for two

persons of the same sex to engage in certain intimate sexual conduct." *Id.* at 562 (emphasis added). And, in concluding, the Court stated: "The Texas *statute furthers no legitimate state interest* which can justify its intrusion into the personal and private life of the individual." *Id.* at 578 (emphasis added); see also *id.* at 579 (O'Connor, J., concurring) ("I agree with the Court that Texas' statute banning same-sex sodomy is unconstitutional.").

The Court also stated that its previous decision in *Bowers v. Hardwick* – which considered a *facial* challenge to Georgia's sodomy statute – "was not correct when it was decided, and * * * is not correct today," indicating that the *Bowers* Court should have found the law facially invalid. *Lawrence*, 539 U.S. at 578 (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

2. Virginia's sodomy statute is facially invalid for the same reasons that the statutes in *Lawrence* and *Bowers v. Hardwick* were unconstitutional.

Virginia's sodomy statute is comparable to the Texas statute in *Lawrence* – except that Virginia's intrusion upon private sexual conduct is much greater, prohibiting both heterosexual and homosexual sodomy. And where the Texas statute made sodomy a misdemeanor, Virginia's law makes it a felony. *See Lawrence*, 539 U.S. at 575 ("The offense, to be sure, is but a class C misdemeanor, a minor offense in the Texas legal system."); Va. Code § 18.2-361 (making sodomy a "Class 6 felony"). This makes Virginia's law substantially identical to the now-invalidated Georgia statute at issue in *Bowers*. *See Bowers*, 478 U.S. at 197-98 (Powell, J., concurring) ("Under the Georgia statute a single act

of sodomy, even in the private setting of a home, is a felony * * *.").

Thus, if the statues in *Lawrence* and *Bowers* are facially invalid – and they are – then Virginia's statute is also facially invalid, and Mr. MacDonald's conviction under it cannot stand.

### B. The Virginia Supreme Court's attempt to rewrite the statute to evade *Lawrence* must fail.

The Virginia Supreme Court attempted to rescue the Virginia statute from invalidation by concluding that "[n]othing in *Lawrence* * * * prohibits the application of the sodomy statute to conduct between adults and minors." App. 29a. The state court's approach, however, essentially re-wrote the statute to add a new element that the legislature did not include: that the sodomy must be with a person who is under age 18.

In effect, then, the court turned Virginia's sodomy statute into a statutory-rape law. But Virginia *already has* a statutory rape law, and statutes prohibiting sodomy with persons age 13 and under, sodomy with persons ages 13 and 14, and contribution to the delinquency of a minor – none of which prohibit the conduct at issue in this case. *See* Va. Code §§ 18.2-63 ("carnal knowledge" statute making sexual intercourse and sodomy with 13- and 14-year-olds a felony), 18.2-67.1 ("forcible sodomy" statute making sodomy with persons 13 or younger a felony), 18.2-371 (contributing-to-delinquency statute). Thus, when the Virginia legislature addressed sexual conduct involving persons under

18, it chose not to criminalize the behavior for which Petitioner was convicted.

The court's revision of the statute was improper. As an initial matter, as discussed above, *Lawrence* required that state sodomy statutes be *abolished*; it did not leave Texas with the option of enforcing its sodomy statute even on a limited basis. Indeed, this Court specifically rejected that possibility when it noted that leaving the statute on the books to be applied in a different manner would allow the "stigma" against homosexuals to persist. *Lawrence*, 539 U.S. at 576.

In addition, this Court has long cautioned against "rewrit[ing] a law to conform it to constitutional requirements," particularly where, as here, legislative line-drawing is necessary. *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006) (citing *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988)); *see also, e.g., Marchetti v. United States*, 390 U.S. 39, 60 n.18 (1968) (Court cannot render statute constitutional where it "would be required not merely to strike out words, but to insert words that are not now in the statute"); *Butts v. Merchants & Miners Transp. Co.*, 230 U.S. 126, 134-35 (1913) (refusing to add words to limit statute to constitutional applications); *United States v. Reese*, 92 U.S. 214, 221 (1876) (refusing to add words to make statute enforceable).

More importantly, leaving an extremely broad statute on the books, most applications of which would be unquestionably unconstitutional, prevents citizens from knowing in advance whether certain actions violate the law because they cannot know the circumstances under which a court would find the

law's application constitutional. Thus, this Court has been "wary of legislatures who would rely on [the courts'] intervention, for '[i]t would certainly be dangerous if the legislature could set a net big large enough to catch all potential offenders, and leave it to the courts to step inside' to announce to whom the statute may be applied." *Ayotte*, 546 U.S. at 330 (quoting *Reese*, 92 U.S. at 221). As one court put it, "[c]ourts cannot save a penal statute by imposing *post facto* limitations on official discretion through case by case adjudications where no such restraints appear on the face of the legislation." *State v. Newstrom*, 371 N.W.2d 525, 529 (Minn. 1985).

Moreover, a statute cannot simply announce that every activity that is not protected under the Constitution is prohibited; it must state specifically what conduct constitutes a criminal offense. *See United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921) (striking down statute where any "attempt to enforce [it] would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury"); *State v. Richardson*, 300 S.E.2d 379, 381 (N.C. 1983) (noting that if the legislature wishes to criminalize certain sexual acts, "it should do so with specificity since [it] is a criminal statute").

Here, if Mr. MacDonald had consulted Virginia law and *Lawrence* in advance, he would have had no reason to know that his conduct was illegal. None of Virginia's statutes addressing sexual activity with individuals under age 18 criminalized his conduct, and the sodomy statute, which targets conduct that

is constitutionally protected under *Lawrence*, makes no mention of minors.

If the Virginia legislature had determined that 16- and 17-year-olds are incapable of giving consent and wanted to ban sexual activity with them, as it did with 13- and 14-year-olds, *Lawrence* suggests that it could have done so. In fact, however, the legislature did not choose to do so – and the Virginia court therefore lacked any constitutional basis for writing a new statutory-rape statute on the legislature's behalf for the purpose of evading this Court's ruling in *Lawrence*.

### C. Even with the Virginia Supreme Court's revision, Virginia's sodomy statute is unconstitutional under *Lawrence*.

Even if courts were permitted to add elements to criminal statutes to make them constitutional, Virginia's "revised" sodomy statute would still be facially invalid under *Lawrence* because it still discriminates against sodomy and, by extension, the private conduct of homosexuals.

According to the reasoning employed by the Virginia courts in this case, acts of sodomy with and between 15-, 16-, and 17-year-olds are punishable as felonies under the general sodomy statute. At the same time, however, heterosexual intercourse between 15-, 16-, and 17-year-olds is fully legal because Virginia's age of consent is fifteen. *See Martin v. Commonwealth*, No. 1966-04-4, 2005 Va. App. LEXIS 337, *6 (Va. Ct. App. Sept. 6, 2005). And heterosexual intercourse between a person 18 or older and a 15-, 16-, or 17-year-old is, unlike sodomy, punishable only as contributing to the delinquency of

a minor, which is a misdemeanor, not a felony. Va. Code § 18.2-371.

Thus, Virginia law still punishes sodomy as a felony under circumstances where it does not punish heterosexual intercourse at all, and it punishes sodomy severely under circumstances where it punishes heterosexual intercourse relatively lightly. Thus, heterosexual teens can engage in sexual intercourse without running afoul of the law, while homosexual teens cannot engage in homosexual conduct without committing a felony. *See Lawrence*, 539 U.S. at 578 (sodomy law improperly prohibited "sexual practices common to a homosexual lifestyle").

Accordingly, the Virginia court's current treatment of sodomy runs directly contrary to *Lawrence*'s command that governments not discriminate between different types of private, consensual, non-commercial sexual conduct, appears to reflect a moral judgment that sodomy is somehow worse than heterosexual intercourse, and serves to perpetuate the demeaning "stigma" against homosexuals that sodomy laws create, and which *Lawrence* sought to eliminate. *See Lawrence*, 539 U.S. at 575 ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.").

Thus, the Virginia courts have not saved the statute from invalidation under *Lawrence* – and in attempting to do so, they have illustrated why facial invalidation of all general sodomy statutes was necessary. If Virginia wishes to punish the conduct at issue in this case, its legislature must craft a

statute that respects the liberty interest that *Lawrence* recognized and does not discriminate against particular forms of private, consensual, non-commercial sexual conduct. Virginia's legislature has not done this, and Mr. MacDonald's conviction therefore cannot stand.

### D. Even if the Virginia statute were not facially invalid, it would still be unconstitutional as applied to Petitioner.

Even if Virginia's sodomy statute were not facially invalid, it would still be invalid as applied to Mr. MacDonald because, as discussed above, all parties involved in the underlying conduct were above Virginia's age of consent and therefore protected under *Lawrence*.

Virginia law defines sodomy as "forcible" – that is, non-consensual – only when it is committed with a person age 13 or younger. Va. Code § 18.2-67.1. Virginia law also prohibits carnal knowledge, including but not limited to sodomy, with a person age 13 or 14. Va. Code § 18.2-63. Sex with anyone above age 14, however, does not constitute statutory rape or any other felony; in other words, "in Virginia, the age of consent is fifteen years." *Martin*, 2005 Va. App. LEXIS 337 at *6 (quoting *Stump v. Commonwealth*, 119 S.E. 72, 73 (Va. 1923)).

Although *Lawrence* left open the possibility that states could limit the ability of "minors" to engage in sodomy, its focus in doing so was on parties' ability to consent, not on their age. The Court noted, for example, that in the nineteenth century "[a] substantial number of sodomy prosecutions and convictions for which there are surviving records

were for predatory acts against *those who could not or did not consent*, as in the case of a minor or the victim of an assault," and one participant in an act of sodomy could testify against the other "if he or she * * * was a minor *and therefore incapable of consent*." *Lawrence*, 539 U.S. at 569 (emphasis added).

At the conclusion of *Lawrence*, the Court suggested possible exceptions to the right of sexual privacy it had just recognized:

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution.

*Id.* at 578. This discussion appears to contemplate laws other than general sodomy statutes that remain valid after *Lawrence*. For example, the reference to "minors" apparently refers to individuals who are under the age of consent and thus contemplates crimes such as statutory rape and contributing to the delinquency of a minor. The second sentence appears to refer to victims of sexual assault ("injured") and incest ("coerced or who are situated in relationships where consent might not easily be refused"). And the final sentence refers to offenses related to commercial sexual activity, such as solicitation and prostitution.

Nothing in *Lawrence* indicates that states may still prosecute anyone under a general sodomy statute for consensual conduct that would be wholly legal in the absence of the sodomy statute; rather, *Lawrence* protects such conduct. Thus, Virginia's

statute fails not only facially but also as applied to Mr. MacDonald.

## II. The due process claim is a federal issue of considerable importance.

Although Mr. MacDonald's due process claim is ripe for review, it is true that the Court normally does not grant plenary review for cases with this case's procedural posture. The lower court's denial of a COA did not create a conflict among the Circuits, and the Court of Appeals did not review the underlying merits of the due process question, a factor this Court uses in deciding whether to grant plenary review.

Nevertheless, this Court should grant the writ for three reasons.

First, the lower court's treatment of Mr. MacDonald's request for a COA clearly contravened this Court's decisions holding that a defendant need only show that the district court's decision was "debatable." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The effect of the lower court's refusal to grant the COA was to deny Mr. MacDonald not one but two rights: the benefit of federal appellate review of his habeas claim and his due process right to privacy. Given the importance this Court has placed on habeas rights and the longstanding primacy of due process, the denial of the COA alone warrants review.

In addition, this Court invalidated all general sodomy laws seven years ago in *Lawrence* -- yet Mr. MacDonald was charged, convicted of a felony, sentenced to imprisonment, and branded a sex

offender – and thus must register wherever he lives and suffer a permanent stigma[2] – for participating in an act that a large percentage of Americans perform with regularity.[3] Because this practice is so widespread, the risk of arbitrary enforcement against only a select few participants based on moral considerations *Lawrence* deemed improper is high. The cornerstone of due process is that the law must not be arbitrarily applied – but Virginia's application of its statute has been and can only be arbitrary. The Court should therefore grant the writ here because both lower courts decided a "federal question in a way that conflicts with the relevant decisions of this Court." S. Ct. R. 10(c).

Second, the practical effect of the Virginia Supreme Court's ruling is that, although the state has granted people over 15 to the ability to legally consent to sex, those individuals nevertheless have no right of privacy with respect to sexual conduct. In other words, if a 15- or 16-year old has consensual private oral sex, he or she can be charged with a felony – even though he or she could not be charged with anything if the conduct had been heterosexual

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[2] *Lawrence* recognized the "collateral consequences" this can entail, "such as notations on job application forms, to mention but one example." 539 U.S. at 576.

[3] *See* Debby Herbenick, et al., *Sexual Behaviors, Relationships, and Perceived Health Status Among Women in the United States*, J. of Sexual Medicine, Vol. 7, Supplement 5, at 282 (2010) (reporting that over 50% of women ages 18 to 39 had participated in oral sex in the past 90 days); Michael Reece, et al., *Sexual Behaviors, Relationships, and Perceived Health Status Among Men in the United States*, J. of Sexual Medicine, Vol. 7, Supplement 5, at 296 (2010) (reporting that over 40% of men age 19 to 24 and over 60% of men age 25 to 39 had participated in oral sex in the past 90 days).

intercourse, and even though a large percentage of 15-to-18-year-olds participate in this activity,[4] which no law other than the general sodomy statute prohibits. The question of whether these younger citizens are conferred the same rights as their older counterparts is a question of significant impact that warrants federal appellate review. In sum, the resolution of the due process question will affect more than just Mr. MacDonald; it will affect young people in Virginia and the other states that have not repealed their sodomy statutes after *Lawrence*.

Third, although seven years have passed since *Lawrence* overturned all state general sodomy statutes, the scope of *Lawrence* continues to divide the 12 states (other than Texas) that possessed sodomy or crimes-of-nature statutes when *Lawrence* was decided.[5] In Louisiana, for example, a trial court declared the state's sodomy statute facially unconstitutional on the basis of *Lawrence*, and the Louisiana Attorney General declined to even defend the statute on appeal. *See La. Electorate of Gays & Lesbians, Inc. v. Connick*, 902 So.2d 1090, 1094 (La. Ct. App. 2005). In addition, a number of states with

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[4] *See* W. Mosher, et al., *Sexual Behavior and Selected Health Measures: Men and Women 15-44 Years of Age, United States, 2002*, Advanced Data from Vital and Health Statistics, Sept. 15, 2005 at 21-22 (CDC study finding more than half of teenagers age 15 to 19 have engaged in oral sex).

[5] *See* Ala. Code § 13A-6-60(2); Fla. Stat. Ann. § 800.02; Idaho Code § 18-6605; Kan. Stat. Ann. § 21-3505; La. Rev. Stat. Ann. 14:89; Miss. Code Ann. 97-29-59; Mo. Rev. Stat. § 558.011; N.C. Gen. Stat. §§ 14-177, 15A-1340.17 (one year); Okla. Stat. tit. 21, § 886, *amended by* 2002 Okla. Sess. Law Serv. ch. 460, § 8; S.C. Code Ann. § 16-15-120; Utah Code Ann. §§ 76-5-403(1), 76-3-204(2); Va. Code Ann. § 18.2-361.

sodomy statutes still on the books have not prosecuted anyone for sodomy after *Lawrence*.[6]

On the other hand, Virginia has continued to apply its sodomy statute – but only on a limited, inconsistent basis. Thus, while there is no definitive split among the states' high courts, there is a real difference in how the states apply their sodomy statutes. And, as noted above, this difference has a real-world impact for the many people who engage in this type of sexual conduct, who may fear that a state may strike out against them as it did against Mr. MacDonald. Indeed, even in states that have not yet enforced their sodomy statutes after *Lawrence*, people face the prospect of sudden, arbitrary enforcement of the statute against them under circumstances where the state has decided – without warning – that it is still entitled to enforce it. Thus, this Court's clarification on the scope of *Lawrence* is necessary to quell the arbitrary application of the criminal law against people engaging in private and consensual sex.

## III. This case warrants an exercise of this Court's summary disposition powers.

The administration of justice would benefit from an exercise of this Court's summary disposition powers in this case. There can be little question that the Court of Appeals misunderstood its role in reviewing habeas claims when it denied the request for COA. This Court often summarily reverses when

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[6] It appears that only two states, Virginia and North Carolina, both in the Fourth Circuit, have enforced crimes-against-nature or sodomy laws post-*Lawrence*. *See, e.g., State v. Whiteley*, 616 S.E.2d 576 (N.C. Ct. App. 2005).

a court of appeals simply misunderstands the Court's precedents. *See, e.g., Presley v. Georgia*, 558 U. S. __, 130 S.Ct. 721 (2010); *Spears v. United States*, 555 U.S. __, 129 S.Ct. 840 (2009). It also does so where the lower court's decision was unreasonable. *See, e.g., Porter v. McCollum*, 558 U.S. __, 130 S.Ct. 447 (2009). The Court also summarily reverses where the court below did not review the merits of a particular claim. *See, e.g., Corcoran v. Levenhagen*, 558 U.S. __, 130 S.Ct. 8 (2009). Thus, it would be appropriate for the Court to summarily reverse so here.

The Court has also granted the writ, vacated the judgment, and remanded to allow the Court of Appeals to reconsider in light of precedent, *see e.g., Webster v. Cooper*, 558 U. S. __, 130 S. Ct. 456 (2009), or to give the lower court another try in light of new understanding, *see, e.g., Youngblood v. West Virginia*, 547 U.S. 867 (2006). This Court issues a GVR to conserve "the scarce resources of this Court that might otherwise be expended on plenary consideration" and to "assist[] the court below by flagging a particular issue that it does not appear to have fully considered * * * *" *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996). Here the Court's resources could be conserved by summarily reversing the lower court's judgment or, in the alternative, issuing a GVR order in light of *Miller-El v. Cockrell*, *Lawrence v. Texas*, or both.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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384 Fed.Appx. 273

**UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

WILLIAM SCOTT MCDONALD, a/k/a MacDonald,
Petitioner-Appellant,

v.

GENE M. JOHNSON, Director Virginia Department of Corrections,
Respondent-Appellee.

No. 09-7973.
Submitted: June 17, 2010.
Decided: June 24, 2010.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Gerald Bruce Lee, District Judge. (1:08-cv-00781-GBL-TRJ). William Scott McDonald, Appellant Pro Se. Robert H. Anderson, III, Office of the Attorney General of Virginia, Richmond, Virginia, for Appellee.

Before MOTZ and KING, Circuit Judges, and HAMILTON, Senior Circuit Judge.

PER CURIAM:

William Scott McDonald seeks to appeal the district court's order denying relief on his 28 U.S.C. § 2254 (2006) petition. The order is not appealable unless a

circuit justice or judge issues a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1) (2006). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2006). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. *Slack v. McDaniel,* 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000); *see Miller-El v. Cockrell,* 537 U.S. 322, 336-38, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable, and that the petition states a debatable claim of the denial of a constitutional right. *Slack,* 529 U.S. at 484-85, 120 S.Ct. 1595. We have independently reviewed the record and conclude McDonald has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF VIRGINIA**
**Alexandria Division**

William Scott MacDonald, a/k/a William Scott McDonald, Petitioner,

1:08cv781(GBL/TRJ)

v.

Gene Johnson, Respondent.

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MEMORANDUM OPINION

William Scott MacDonald, a Virginia inmate proceeding pro se, has filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, challenging the validity of his conviction of carnal knowledge of a minor and contributing to the delinquency of a minor in the Circuit Court for Prince George County, Virginia. Respondent has filed a Motion to Dismiss and Rule 5 Answer. Petitioner was given the opportunity to file responsive materials, pursuant to *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), and has filed a response. For the reasons that follow, MacDonald's claims must be dismissed.

I.

On May 3, 2005, MacDonald was convicted of carnal knowledge of a minor and contributing to the

delinquency of a minor following a bench trial. The trial court found that MacDonald, who was 45 to 47 years old at the time of the incidents, engaged in private, sexual contact with two girls, ages 16 and 17 at the time. MacDonald appealed his conviction to the Court of Appeals of Virginia, arguing that Virginia Code § 18.2-361(A) is unconstitutional under the Due Process Clause of the Fourteenth Amendment. The Court of Appeals held that the statute does not violate the Fourteenth Amendment. *McDonald v. Commonwealth*, R. No. 1180-Case 1:08-cv-00781-GBL-TRJ Document 20 Filed 10/09/09 Page 1 of 10 05-2 (Va. Ct. App. June 13,2006). MacDonald then appealed to the Supreme Court of Virginia, which found no error in the decision of the Court of Appeals. *McDonald v. Commonwealth,* R. No. 061456 (Va. June 8, 2007).

While his direct appeals were pending, MacDonald filed a habeas petition in the Circuit Court of Prince George County, raising the following claims:

1. Ineffective assistance of counsel for

   (a) failure to file a motion for and receive a Bill of Particulars;

   (b) failure to move for a new trial based on newly discovered evidence;

   (c) failure to subpoena "crucial evidence" seized by the police department;

   (d) failure to subpoena witnesses for trial;

2. Procedural misconduct for

   (a) wrongfully withholding evidence;

(b) making inflammatory comments during the trial and at sentencing; and

3. Unauthorized revision by the trial court of Virginia Code § 18.2-361, "outside of Legislative authority."

The Circuit Court dismissed MacDonald's petition. *MacDonald v. Johnson,* Case No. 2005-98 (Va. Cir. Ct. March 16, 2006). MacDonald then appealed to the Supreme Court of Virginia, which found no reversible error. *MacDonald v. Johnson*, R. No. 060854 (Va. Aug. 15, 2006). On July 25, 2008, MacDonald filed the instant petition, raising the following three claims:

1. Ineffective assistance of counsel for

(a) failure to file a motion for and receive a Bill of Particulars;

(b) failure to move for a new trial based on newly discovered evidence;

(c) failure to subpoena "crucial evidence" seized by the police department;

(d) failure to subpoena witnesses for trial;

(e) failure to object to illegally obtained evidence; and

(f) failure to authenticate petitioner's exculpatory statements;

2. Prosecutorial misconduct for

(a) wrongfully withholding evidence;

(b) making inflammatory comments during the trial and at sentencing; and

(c) using illegally obtained evidence; and

3. Unauthorized revision by the trial court of Virginia Code § 18.2-361, "without and outside of legislative authority."

By Orders dated January 14, 2009, and March 4, 2009, this Court found claims 1(e), 1(f), 2(a), and 2(c) to be procedurally barred from review. Respondent filed a Rule 5 Answer and a Motion to Dismiss MacDonald's remaining claims. Petitioner filed a response to respondent's motion and then filed a Motion for Extension of Time to file his response, which this Court will deny as moot. Accordingly, this matter is now ripe for review.

II.

When a state court has addressed the merits of a claim raised in a federal habeas petition, a federal court may not grant the petition based on the claim unless the state court's adjudication is contrary to, or an unreasonable application of, clearly established federal law, or is based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d). The evaluation of whether a state court decision is "contrary to" or "an unreasonable application of federal law is based on an independent review of each standard. *See Williams v. Taylor,* 529 U.S. 362,412-13 (2000). A state court determination runs afoul of the "contrary to" standard if it "arrives at a conclusion opposite to that reached by [the United States Supreme] Court on a question of law or if the state court decides a case differently than [the

United States Supreme] Court has on a set of materially indistinguishable facts." *Id.* at 413. Under the "unreasonable application" clause, the writ should be granted if the federal court finds that the state court "identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* This standard of reasonableness is an objective one. *Id.* at 410.

III.

Claim 1: Ineffective Assistance of Counsel

MacDonald has failed to show that the state court's adjudications are contrary to, or an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984), or are based on an unreasonable determination of the facts, and therefore his claims fail. *See* 28 U.S.C. § 2254(d).

To establish ineffective assistance of counsel, petitioner must show that (1) "in light of all the circumstances, the identified acts or omissions [of counsel] were outside the range of professionally competent assistance," *Strickland,* 466 U.S. at 690 (defining ineffective assistance of counsel as falling below an objective standard of reasonableness and applying a strong presumption of competence and deference to attorney judgment); and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id* at 694. A successful petition "must show both deficient performance and prejudice," and "the two are separate and distinct elements of an ineffective assistance claim." *Spencer v. Murray*, 18 F.3d 229,232-33 (4th Cir. 1994).

Moreover, a court does not need to review the reasonableness of counsel's performance if the petitioner fails to show prejudice. *Ouesinberry v. Taylore,* 162 F.3d 273,278 (4th Cir. 1998).

With respect to the first prong of the Strickland test, "[j]udicial scrutiny of counsel's performance must be highly deferential," *Strickland*, 466 U.S. at 689, and a court must "presume that challenged acts are likely the result of sound trial strategy." *Spencer*, 18 F.3d at 233. With respect to the second prong of the *Strickland* test, "a reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. In order to undermine confidence in the case outcome, the petitioner must show more than a possibility that the results of the trial would have been different. *Washington v. Murray*, 4 F.3d 1285, 1290 (4th Cir. 1993).

In Claim I(a), petitioner asserts that counsel's failure to file a motion for and receive a Bill of Particulars constituted ineffective assistance. Specifically, petitioner states that counsel never informed him of the exact dates of his alleged crimes. His support for this argument is a lack of notes to that effect in counsel's files. Petitioner fails to establish more than a remote possibility that a Bill of Particulars would have affected the outcome of the trial, assuming that the court would have even granted such a motion. A Bill of Particulars would not have supplied petitioner with the information he sought; even the victims could not remember exactly the dates of most of the incidents. (Trial Tr. 43, 49, 50, 56, 80, March 3, 2005.) Furthermore, there is no indication that knowing particular dates realistically

would have affected the overall outcome of the trial. Thus, Claim 1(a) must be dismissed.

In Claim 1(b), petitioner asserts that counsel was ineffective in failing to move for a new trial on the basis of newly discovered evidence. The evidence at issue is a letter from the Department of Veterans Affairs ("VA") MacDonald received four days after trial, granting him a disability rating based on post-traumatic stress disorder ("PTSD"). In Virginia, motions for new trials based on newly-discovered evidence "are addressed to the sound discretion of the trial judge, are not looked upon with favor, are considered with special care and caution, and are awarded with great reluctance." *Commonwealth v. Tweed*, 264 Va. 524, 528, 570 S.E.2d 797, 800 (2002) (quoting *Stockton v. Commonwealth*, 227 Va. 124, 149, 314 S.E.2d 371, 387 (1984)). In order for a defendant to prevail on a motion for a new trial based on newly-discovered evidence, he must demonstrate that the evidence:

> "(1) appears to have been discovered subsequent to the trial; (2) could not have been secured for use at the trial in the exercise of reasonable diligence by [appellant]; (3) is not merely cumulative, corroborative or collateral; and (4) is material, and such as should produce opposite results on the merits at another trial."

*Odom v. Commonwealth*, 225 Va. 123,130, 301 S.E.2d 145,149 (1983).

Under the *Odom* standard, the letter in this case would not have entitled MacDonald to a new trial. While the letter itself may not have been discoverable before trial, MacDonald could have: (1)

requested the letter to be expedited, as it only arrived several days after trial; (2) provided counsel with the information he submitted to the VA in support of his claim for disability; or (3) informed counsel that he was suffering from symptoms of PTSD. All of this information could have been admitted at trial as evidence that MacDonald suffered from PTSD, and MacDonald's failure to take any of these steps demonstrates his lack of reasonable diligence. Moreover, there is nothing to indicate that the letter granting MacDonald a disability rating based on PTSD would produce his acquittal at a second trial. Thus, moving for a new trial would be futile, and because petitioner cannot demonstrate prejudice under Strickland. Claim 1 (b) fails.

In Claim l(c), petitioner asserts that counsel was ineffective for failing to subpoena "crucial evidence" in the police department's possession. Specifically, MacDonald wanted counsel to subpoena MacDonald's personal notebook, which contained accounts of his criminal activities, and he invokes the best evidence rule in support of his argument. The best evidence rule provides that "where the contents of a writing are desired to be proved, the writing [the primary evidence] itself must be produced or its absence sufficiently accounted for before other evidence of its contents can be admitted." *Randolph v. Commonwealth*, 145 Va. 883, 889, 134 S.E. 544, 546 (1926). If sufficient evidence discloses that the primary evidence is not available, then secondary evidence may be admitted instead. *Id.* However, the sufficiency of the foundation laid for the admission of secondary evidence is a preliminary question addressed to the trial court's discretion.

*Brown v. Commonwealth*, R. No. 1078-06-2,2007 WL 1529600 (Va. Ct. App. May 29, 2007) (citing *Beirne v. Rosser*, 67 Va. (26 Gratt.) 537, 544-45 (1875)).

In this case, MacDonald admits that the notebook's contents were transcribed by his wife, and the transcription was admitted into evidence in lieu of the original notebook. Furthermore, MacDonald does not indicate why the notebook itself was "crucial evidence" and why the transcription was insufficient. Because the decision to admit the transcription as proper evidence belonged to the trial court, not to petitioner's counsel, counsel was not ineffective. Thus, Claim l(c) must be dismissed.

In Claim l(d), petitioner asserts that counsel was ineffective for failing to subpoena witnesses for trial. The decision whether to call a witness is a tactical decision not amounting to ineffective assistance of counsel, and counsel's trial strategy decisions deserve a high degree of deference in habeas review. *See Goodson v. United States*, 564 F.2d 1071 (4th Cir. 1977). As the Circuit Court noted, the expected testimony of one witness, Alicia Royer, would be meaningless if admitted and may even be inadmissible as habit evidence under Virginia Code § 8.01-397.1. Another witness, Professor Connie Kirkland, was expected to testify regarding sexual assault on males. However, given the evidence already presented against petitioner, the Circuit Court noted that her testimony would have been meaningless. Thus, counsel could not have been ineffective for failing to call witness whose testimonies would be unnecessary. Furthermore, MacDonald confirmed under oath at trial that his witnesses were present. (Trial Tr. 9, March 3,2005.) MacDonald claims that counsel induced him to lie to

the court by ordering him to testify that the witnesses were present. However, the state habeas court noted that this claim lacks credibility coming from an educated, middle aged veteran, and this Court must accept such a determination as true. Therefore, Claim l(d) fails as well.

Claim 2(b): Prosecutorial Misconduct

In Claim 2(b), petitioner asserts that the prosecutor in his case made false and inflammatory statements to the court which, he asserts without support, "greatly prejudiced" petitioner. Specifically, petitioner alleges that the prosecutor told the court that petitioner made certain statements when he did not. Although the state habeas court did not specifically address this claim in its opinion, the court did note that petitioner's other claims of prosecutorial misconduct could have been raised on direct appeal and thus were procedurally barred from review. *MacDonald v. Johnson*, Case No. 2005-269, at 37. The same law would apply to bar the instant claim as well. *See Slayton v. Parrigam*, 215 Va. 27,30,205 S.E.2d 680, 682 (1974) (holding that claims that could have been but were not raised at trial and on appeal are not cognizable in state habeas corpus proceedings). Furthermore, under § 2254(b)(2), federal district courts have the discretion to forego the exhaustion requirement, which usually necessitates a state habeas ruling on a claim before a federal habeas court can address the claim, for claims that clearly lack merit. *See generally, Swisher v. True*, 325 F.3d 225,232-33 (4th Cir.), cert, denied, 539 U.S. 971 (2003) (affirming district court's discretionary decision to elect to deny habeas corpus relief on the merits pursuant to § 2254(b)(2), although claim was "clearly unexhausted"). Here,

even if it remains unexhausted, Claim 2(b) is clearly without merit. To establish prosecutorial misconduct, petitioner must show: (1) the prosecutor's conduct was improper, and (2) the conduct "prejudiced the defendant's substantial rights so to deny the defendant a fair trial." *United States v. Alerre*, 430 F.3d 681,689 (4th Cir.2005). Here, even assuming arguendo that the prosecutor's comments were improper, petitioner has asserted no evidence that the prosecutor's statements swayed the judge's decision and led him to convict petitioner. Therefore, Claim 2(b) must be dismissed.

Claim 3: Unauthorized revision by the trial court of Virginia Code § 18.2-361

Finally, MacDonald argues that the trial court "rewrote the law" when convicting him under § 18.2-361, which makes it a felony to engage in oral or anal sexual relations with anyone. He alleges that the court improperly added an age requirement of "under the age of eighteen" when applying the statute to him, and that the statute as written is unconstitutional as a result of *Lawrence v. Texas*, 539 U.S. 558 (2003) (rendering a Texas homosexual sodomy law invalid under the Due Process Clause of the Fourteenth Amendment). The Court of Appeals of Virginia considered this claim on direct appeal and found the statute constitutional. *McDonald v. Commonwealth*, R. No. 1180-05-2 (Va. Ct. App. June 13, 2006). The state habeas court found Claim 3 procedurally barred from habeas review because the claim could only be raised on direct appeal. *MacDonald v. Johnson*, Case No. 2005-98 (Va. Cir. Ct. March 16, 2006). Thus, this Court must evaluate Claim 3 under the standard articulated in *Williams*

*v. Taylor*, 529 U.S. 362, 410-13 (2000), and discussed above. *See* Section II, *supra*.

The Court of Appeals' determination is based on clearly established federal law. As the court noted, Virginia considers persons aged sixteen and seventeen to be children, and the Supreme Court in Lawrence explicitly stated that the ruling did not apply to sexual acts involving children. *McDonald*, R. No. 1180-05-2 (citing *Lawrence*, 539 U.S. at 578). Thus, as the Court of Appeals of Virginia found, the statute is not unconstitutional as applied to MacDonald, and Claim 3 fails.

IV.

For the above stated reasons, this petition will be dismissed. An appropriate Order shall issue.

Entered this 9th day of October, 2009.

Alexandria, Virginia

/s/ Gerald Bruce Lee
United States District Judge

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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF VIRGINIA**
**Alexandria Division**

William Scott MacDonald, a/k/a William Scott McDonald, Petitioner,

v.

Gene Johnson, Respondent.

Case 1:08-cv-00781-GBL-TRJ

**ORDER**

For the reasons stated in the accompanying Memorandum Opinion, it is hereby ORDERED that respondent's Motion to Dismiss (Docket #10) be and is GRANTED, and this petition is DISMISSED WITH PREJUDICE; and it is further ORDERED that plaintiffs Motion for Extension of Time (Docket #18) be and is DENIED AS MOOT.

This is a Final Order for purposes of appeal. To appeal, plaintiff must file a written notice of appeal with the Clerk's Office within thirty (30) days of the date of this Order. A written notice of appeal is a short statement stating a desire to appeal this Order and noting the date of the Order plaintiff wants to appeal. Plaintiff need not explain the grounds for appeal until so directed by the court. Petitioner must also request a certificate of appealability from a circuit justice or judge. See 28 U.S.C. § 2253 and Fed. R. App. P. 22(b). For reasons stated in the accompanying Memorandum Opinion, this Court expressly declines to issue such a certificate.

The Clerk is directed to send a copy of this Order and Memorandum Opinion to petitioner and to counsel of record for respondent, and to close this civil case.

Entered this 9th day of October 2009.

Alexandria, Virginia

/s/ Gerald Bruce Lee

United States District Judge

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**VIRGINIA SUPREME COURT**

Present: Hassell, C.J., Keenan, Koontz, Kinser, Lemons, and Agee, JJ., and Russell, S.J.

WILLIAM S. MCDONALD, A/K/A WILLIAM S. MACDONALD,

v.

COMMONWEALTH OF VIRGINIA.

Record No. 061456

OPINION BY JUSTICE DONALD W. LEMONS

June 8, 2007

FROM THE COURT OF APPEALS OF VIRGINIA

In this appeal, we consider a constitutional challenge to Code § 18.2-361 prohibiting sodomy.

I. Facts

The facts of this case are not in dispute. William S. McDonald ("McDonald"), a man who was 45 to 47 years old during the years when the subject events took place, engaged in private, sexual intercourse and oral sodomy with a 16-year-old female, L.F., on two occasions. McDonald also had private, sexual intercourse and engaged in oral sodomy with a

different female, A.J., who was 17 years of age at the time. In a nonjury trial, McDonald was found guilty of one count of contributing to the delinquency of a minor under Code § 18.2-371 and four counts of sodomy under Code § 18.2-361. Only the sodomy convictions are before this Court on appeal.

II. Proceedings

a. Trial Court

Prior to trial, a written "Motion to Dismiss on Due Process Grounds" was filed asserting that "Code Section 18.2-2-361 violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution" and further citing to this Court's opinion in *Martin v. Ziherl*, 269 Va. 35, 607 S.E.2d 367 (2005). Significantly, the written motion did not state whether the constitutional challenge was facial or as applied to McDonald. There were no memoranda of law or briefs filed in support of the motion to dismiss. Additionally, the Commonwealth filed no written response.

The record does not reveal whether this written motion was the subject of a pre-trial consideration; however, the matter was brought to the trial court's attention at the conclusion of the Commonwealth's case-in-chief. In the oral motion to dismiss, McDonald and the trial court made reference to the written motion previously filed. McDonald's argument at this time was entirely predicated upon his contention that the victims were both "of the age of consent." Counsel for McDonald stated:

> My argument would be you have testimony from these two girls they consented, they were not

> forced, they were not threatened, they were not paid. These were not public acts, they were private, concealed from other people. My argument would be that I believe that the age of consent in Virginia would be sixteen.

Continuing, in an apparent reference to the only case that had been mentioned, *Martin*, counsel stated:

> My argument here would be based on the testimony that you heard thus far that these are two people who are old enough to consent, who have consented, who have not been forced to do anything, who have not been threatened in any way and who are willing participants in these activities. And my argument is that because they are of the age of consent—the court there doesn't say specifically if they are minors this ruling wouldn't apply. It says it may—state regulation of this type of activity might support a different result. But, at the same time we do not have people who are under the age of consent, we have people who are of the age of consent. One girl being seventeen-and-a-half years old at the time and one girl being sixteen at the time. They have not detailed that they have been forced to commit any of these acts. In fact, what Mr. McDonald is accused of is consensual sodomy. And so what I would argue is that because they are of the age of consent and they're old enough to give that consent, there is no crime here, and to punish him would be in violation of the due-process clause of the 14th Amendment, just taking the Commonwealth at its evidence.

At no point in this argument to the trial court did McDonald claim that Code § 18.2-361 was facially unconstitutional nor did he expressly argue that the statute was unconstitutional as applied to him. By implication, McDonald makes an as-applied argument maintaining that on the facts of this case, because the victims were of the age of consent, it would violate the Due Process Clause of the 14th Amendment to find him guilty of the offenses charged. In an apparent reference to *Martin* wherein we stated, "It is important to note that this case does not involve minors, nonconsensual activity, prostitution, or public activity," 269 Va. at 42, 607 S.E.2d at 371, McDonald sought to bring his case within the scope of our decision in Martin by arguing that the specific exceptions we noted did not apply in this case because the age of consent for sodomy was sixteen-years old and both victims were "of age." As presented to the trial court, McDonald's objections were quite narrowly stated.

Addressing the only argument made by McDonald, the trial court stated:

> I don't find that the due-process clause or the case that you cite would abrogate the law as it relates to juveniles and the code section that they're charged under, and I don't find any constitutional violation.

The trial court denied the motion to dismiss. After presentation of McDonald's evidence, counsel for McDonald stated, "Your Honor, the defense at this time will rest and renew its motion to dismiss on the grounds previously stated."No additional arguments were offered in support of the motion to dismiss on constitutional grounds, and the trial court ruled as

follows: "I would overrule your motions at the conclusion of all the evidence and hear argument at this point." The court then heard closing arguments on the merits of the case.

b. Court of Appeals

After conviction, McDonald noted his appeal to the Court of Appeals of Virginia and in his petition stated the Question Presented as follows:

> Did the trial court err in finding that Virginia Code § 18.2-361 Section A remains a valid exercise of the police power of the state, surviving a substantive due process constitutional challenge?

For the first time, McDonald included in his argument: "Virginia Code Section 18.2-361 Section A, insofar as it relates to consensual sodomy between unrelated individuals who have reached the age of consent is facially unconstitutional, as a violation of the Due Process Clause of the Fourteenth Amendment." At the petition stage in the Court of Appeals, McDonald also argued that "the statute is also unconstitutional *as applied* to the Defendant, as it prohibits constitutionally protected conduct between individuals who have reached the age of consent for such acts." Once again, McDonald's argument was predicated upon the age of consent. Upon grant of the petition for appeal, McDonald filed his opening brief reciting the same question presented and making arguments identical to those contained in his petition. The Court of Appeals in a published decision, *McDonald v. Commonwealth*, 48 Va. App. 325, 630 S.E.2d 754 (2006), affirmed the judgment and conviction of the trial court.

The Court of Appeals appeared to hold that McDonald lacked standing to mount a facial challenge to the constitutionality of a statute because a party "has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights." *Id.* at 329, 630 S.E.2d at 756 (quoting *County Court of Ulster County v. Allen*, 442 U.S. 140, 154-55 (1979)). The Court of Appeals appeared to hold that "only an as-applied challenge was appropriate." *Id.* Nonetheless, the Court of Appeals also appeared to decide the facial challenge to the statute by holding that "nothing in *Lawrence* or the Supreme Court of Virginia's opinion in *Martin*. . . facially invalidates Code § 18.2-361(A)." *Id.*

The Court of Appeals then considered an as-applied challenge to the constitutionality of Code § 18.2-361(A). Recognizing that McDonald predicates his argument upon his contention that the victims had reached the "age of consent," the Court of Appeals concluded that the statute "is constitutional as applied to McDonald because his violations involved minors and therefore merit no protection under the Due Process Clause." *Id.* at 332, 630 S.E.2d at 758.

c. Supreme Court of Virginia

Upon appeal to this Court, McDonald assigns error as follows:

> Mr. McDonald assigns as error Judge Haley's decision denying his appeal, and specifically his findings that:

1. That Mr. McDonald did not have standing to mount a facial attack on the constitutionality of Virginia Code § 18.2-361(A).

2. That Virginia Code § 18.2-361(A) survives an as applied constitutional attack where the conduct alleged involved an adult and a minor who is above the age of consent in Virginia.

While assignment of error 2 is worded somewhat differently than the content of McDonald's Question Presented in the Court of Appeals, it nonetheless fairly encompasses his argument to that court. Assignment of error 1 is directed to the judgment of the Court of Appeals. In his brief before this Court, McDonald makes the same arguments he did in the Court of Appeals. He is aided in his arguments by an amicus curiae brief.

But the efforts of the amicus are to no avail because the arguments of the parties on appeal and thus the aid of amicus must be limited to issues preserved in the trial court, Rule 5:25, and to issues presented before the appellate courts, Rule 5A:12, Rule 5:17 and Rule 5:30(c). Of course, an appellate court may not reverse a judgment of the trial court based upon an alleged error in a decision that was not made or upon an issue that was not presented. The trial court in this case never had before it a claim of facial invalidity of Code § 18.2-361(A). Consequently, we will not consider McDonald's first assignment of error. We will consider his limited argument concerning the constitutionality of the statute as applied to him.

III. Analysis

The very narrow issue preserved in the trial court and presented by McDonald for our review is quite simple. McDonald maintains that our decision in *Martin* governs this case, because, he alleges, the victims were of the age of consent and not excepted from the scope of our opinion.

The *Martin* case involved two unmarried adults in a sexually active relationship. 269 Va. at 38, 607 S.E.2d at 368. Martin became infected with the herpes virus allegedly because of sexual contact with Ziherl. *Id.* After their relationship ended, Martin sued Ziherl in tort alleging that he knew he was infected with the sexually transmitted herpes virus when they engaged in unprotected sexual conduct, knew that the virus was contagious, and failed to inform her of his condition. *Id.* Ziherl filed a demurrer asserting that Martin's injuries were caused by her participation in an illegal act under Virginia law and therefore, under *Zysk v. Zysk*, 239 Va. 32, 404 S.E.2d 721 (1990), the motion for judgment did not state a claim upon which relief could be granted. *Id.* The trial court sustained Ziherl's demurrer. *Id.*

On appeal we considered the effect of the decision of the Supreme Court of the United States in *Lawrence v. Texas*, 539 U.S. 558 (2003), upon our prior decision in *Zysk* and further considered whether Code § 18.2-344, the fornication statute, ("Any person, not being married, who voluntarily shall have sexual intercourse with any other person, shall be guilty of fornication, punishable as a Class 4 misdemeanor."), could continue to provide a public policy basis for not permitting civil recovery for the conduct presented in both *Zysk* and *Martin*.

Lawrence had been convicted of violating a Texas statute that made it a crime for two persons of the same sex to engage in certain intimate sexual conduct described as the act of sodomy. Tex. Penal Code Ann. § 21.06(a) (2003). The Court of Appeals for the Texas Fourteenth District rejected Lawrence's constitutional challenge to the statute relying on *Bowers v. Hardwick*, 478 U.S. 186, 189 (1986). The Supreme Court in *Bowers* had previously held that a Georgia statute making it a crime to engage in homosexual sodomy, was constitutional. *Lawrence v. State*, 41 S.W.3d 349, 360-62 (Tex. App. 2001).

Reversing its prior decision in *Bowers*, the Court in *Lawrence* held that the Texas sodomy statute was unconstitutional because it furthered "no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Lawrence*, 539 U.S. at 578. The Court in *Lawrence* noted that:

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.

*Id.*

Upon consideration of the decision in *Lawrence*, we observed in *Martin* that:

> We find no relevant distinction between the circumstances in *Lawrence* and the circumstances

> in the present case . . . . We find no principled way to conclude that the specific act of intercourse is not an element of a personal relationship between two unmarried persons or that the Virginia statute criminalizing intercourse between unmarried persons does not improperly abridge a personal relationship that is within the liberty interest of persons to choose. Because Code § 18.2-344, like the Texas statute at issue in Lawrence, is an attempt by the state to control the liberty interest which is exercised in making these personal decisions, it violates the Due Process Clause of the Fourteenth Amendment.

269 Va. at 41-42, 607 S.E.2d at 370.

First, it is necessary to state that our holding in *Martin* was that, under the circumstances presented, the statute at issue, Code § 18.2-344, was unconstitutional. *See Id.* at 42, 607 S.E.2d at 371. We further stated that:

> It is important to note that this case does not involve minors, non-consensual activity, prostitution, or public activity. The *Lawrence* court indicated that state regulation of that type of activity might support a different result. Our holding, like that of the Supreme Court in *Lawrence*, addresses only private, consensual conduct between adults and the respective statutes' impact on such conduct. Our holding does not affect the Commonwealth's police power regarding regulation of public fornication, prostitution, or other such crimes.

*Id.* at 42-43, 607 S.E.2d at 371. Clearly, the declaration that the holding did not affect the

Commonwealth's police power regarding other crimes is the essence of an as-applied analysis of constitutionality of the statute. After *Martin*, Code § 18.2-344 still has efficacy as noted; consequently, it was not facially invalidated by our opinion.

McDonald's as-applied constitutional challenge to Code § 18.2-361, the sodomy statute, involves McDonald's proposed construction of several statutes. Except for certain conduct between specified related persons, the sodomy statute does not contain age restrictions. *See* Code § 18.2-361. McDonald seeks to "borrow" age restrictions from the contributing to the delinquency of a minor statute, Code § 18.2-371 and the carnal knowledge statute, Code § 18.2-63.

In pertinent part, the contributing to the delinquency of a minor statute states:

> Any person 18 years of age or older, including the parent of any child, who . . .(ii) engages in consensual sexual intercourse with a child 15 or older not his spouse, child, or grandchild, shall be guilty of a Class 1 misdemeanor.

Code § 18.2-371.

In pertinent part, the carnal knowledge statute states:

> If any person carnally knows, without the use of force, a child thirteen years of age or older but under fifteen years of age, such person shall be guilty of a Class 4 felony.

. . . .

> For the purposes of this section, (i) a child under the age of thirteen years shall not be considered a consenting child and (ii) "*carnal knowledge*" includes the acts of sexual intercourse, cunnilingus, fellatio, anallingus, anal intercourse, and animate and inanimate object sexual penetration.

Code § 18.2-63.

McDonald contends that the contributing to the delinquency of a minor statute refers only to sexual intercourse and penalizes such acts as a misdemeanor for an adult to commit such acts upon children aged fifteen, sixteen, or seventeen. Because the statute does not mention sodomy, McDonald argues that the contributing statute does not apply to acts of sodomy. He further infers from the carnal knowledge statute that because prosecution under its provisions includes both sexual intercourse and specified forms of sodomy, that this "puts the age of consent for sexual activity in Virginia at 15 years old." McDonald is incorrect for two reasons: (1) the sodomy statute stands alone and without age restrictions concerning consent in this case, and (2) the real issue in this case is the victims' legal status as minors.

First, the fact that separate statutes may overlap in their proscription of specific conduct does not detract from their independent enforcement except when double jeopardy concerns are implicated. "[W]hen an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants." *United States v. Batchelder*, 442 U.S. 114, 123-24 (1979); *see also Muhammad v.*

*Commonwealth*, 269 Va. 451, 501-02, 619 S.E.2d 16, 45 (2005). "Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion." *Batchelder*, 442 U.S. at 124. McDonald raises no double jeopardy issues. Furthermore, there is no basis for engrafting provisions or perceived implications from the carnal knowledge statute and the laws governing the crime of contributing to the delinquency of a minor into the sodomy statute. Such matters are for legislative consideration, and here the provisions are simply different.

Second, the real issue is the legal status of the victims as minors. Determining the age of majority is the province of the General Assembly. *Mack v. Mack*, 217 Va. 534, 537, 229 S.E.2d 895, 897 (1976) (holding "minority is a legal status subject to change by the legislature"). The Code is quite specific concerning the dividing line between minors and adults. Code § 1-203 ("'*Adult*'" means a person 18 years of age or more."), Code § 1-204 ("For the purposes of all laws of the Commonwealth including common law, case law, and the acts of the General Assembly, unless an exception is specifically provided in this Code, a person shall be an adult, shall be of full age, and shall reach the age of majority when he becomes 18 years of age."), Code § 1-207 )("'*Child*,' '*juvenile*,' '*minor*,' '*infant*,' or any combination thereof means a person less than 18 years of age.").

The sodomy statute has no express age of consent; however, it must be applied in a constitutional manner in conformity with *Lawrence* and *Martin*. The Court in *Lawrence* was explicit in its declaration of the scope of its opinion: "The present case does not involve minors." 539 U.S. at 578. We were equally

explicit in our opinion in *Martin*: "It is important to note that this case does not involve minors, non-consensual activity, prostitution, or public activity. . . .Our holding, like that of the Supreme Court in *Lawrence*, addresses only private, consensual conduct between adults and the respective statutes' impact on such conduct." 269 Va. at 42-43, 607 S.E.2d at 371.

As we have previously held, we "construe the plain language of a statute to have limited application if such a construction will tailor the statute to a constitutional fit." *Virginia Society for Human Life v. Caldwell*, 256 Va. 151, 157 n.3, 500 S.E.2d 814, 817 n.3 (1998). Therefore, when there is an as-applied challenge to a statute, we must interpret the statute in such a manner as to remove constitutional infirmities.

The only issue preserved at the trial court and presented to this Court is an as-applied constitutional challenge to the sodomy statute. McDonald's statutory construction argument is faulty and furthermore, it misses the real issue. The victims in this case were minors, defined by the Code of Virginia as persons under the age of eighteen. See Code § 1-207. Nothing in *Lawrence* or *Martin* prohibits the application of the sodomy statute to conduct between adults and minors.

IV. Conclusion

For the reasons stated, we will affirm the judgment of the Court of Appeals.

Affirmed.

## COURT OF APPEALS OF VIRGINIA

Present: Judges Clements, Haley and Senior Judge Overton

Argued at Richmond, Virginia

WILLIAM SCOTT McDONALD, A/K/A,WILLIAM SCOTT MacDONALD,

v.

COMMONWEALTH OF VIRGINIA.

Record No. 1180-05-2

**OPINION** BY JUDGE JAMES W. HALEY, JR.

JUNE 13, 2006

FROM THE CIRCUIT COURT OF PRINCE GEORGE COUNTY—James F. D'Alton, Jr., Judge

Terry Driskill for appellant.

William E. Thro, State Solicitor General (Judith Williams Jagdmann, Attorney General; D. Mathias Roussy, Jr., Associate State SolicitorGeneral, on brief), for appellee.

William Scott McDonald (appellant) appeals his conviction in a bench trial of four counts of sodomy in violation of Code § 18.2-361(A). His only contention is that Code § 18.2-361(A) is unconstitutional because it violates the Due Process Clause of the Fourteenth Amendment.[1] Finding that the statute,

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[1] At oral argument, appellant also presented an equal protection argument. However, as he failed to present this argument in his writ petition or his brief, we will not consider

as applied, does not violate the Constitution, we affirm.

I.

Facts

As appellant does not challenge the sufficiency of the evidence against him, only a brief discussion of the facts is necessary. On December 31, 2002 and again on April 27, 2003, appellant and L.F. engaged in private, consensual sexual intercourse and oral sodomy, as defined by Code. At oral argument, appellant also presented an equal protection argument. However, as he failed to present this argument in his writ petition or his brief, we will not consider it. Rule 5A:20; *Parker v. Commonwealth*, 42 Va. App. 358, 373, 592 S.E.2d 358, 366 (2004). § 18.2-361(A). Appellant was forty-five years old at the time of the first encounter and forty-six at the time of the second, and L.F. was sixteen years old at the time of both encounters. Then, in June 2004 and again in August 2004, appellant participated in private, consensual sexual intercourse and oral sodomy with A.J. A.J. was seventeen years old at the time of both encounters, while appellant was forty-seven. After the prosecution rested its case and again after the defense rested, appellant moved to strike, claiming that Code § 18.2-361(A) is unconstitutional. The trial court denied both motions and convicted appellant of all counts. Appellant then appealed to this Court.

II.

Analysis

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it. Rule 5A:20; *Parker v. Commonwealth*, 42 Va. App. 358, 373, 592 S.E.2d 358, 366 (2004).

Neither party disputes the timing of these encounters; what acts took place then; that the female participants were ages sixteen and seventeen, respectively; or that Code § 18.2-361(A) clearly prohibits the conduct. The only question presented on appeal is if Code § 18.2-361(A) violates the Due Process Clause of the Fourteenth Amendment. Appellant challenges the constitutionality of the statute both on its face and as applied to him.

We review arguments regarding the constitutionality of a statute *de novo*. *Shivaee v.Commonwealth*, 270 Va. 112, 119, 13 S.E.2d 570, 574 (citing Wilby v. Gostel, 265 Va. 437, 440, 578 S.E.2d 796, 798 (2003); *Eure v. Norfolk Shipbuilding & Drydock Corp.*, 263 Va. 624, 631, 561 S.E.2d 663, 667 (2002)), *cert. denied*, 126 S. Ct. 626 (2005). Furthermore,

> We are guided by the established principle that all acts of the General Assembly are presumed to be constitutional. In applying this principle, we are required to resolve any reasonable doubt regarding the constitutionality of a statute in favor of its validity. . . . [W]e will declare a statute null and void only when it is plainly repugnant to a state or federal constitutional provision.

*In re Phillips*, 265 Va. 81, 85-86, 574 S.E.2d 270, 272 (2003) (internal citations omitted).

A.

Facial Challenge

Appellant contends that Code § 18.2-361(A) is facially unconstitutional because it bans private, consensual sodomy between adults. In *Lawrence v.*

*Texas*, 539 U.S. 558 (2003), the Supreme Court held that the right to liberty under the Due Process Clause of the Fourteenth Amendment rendered invalid a Texas law prohibiting homosexual sodomy. In reaching that decision, the Court held that a state may not criminalize such sexual conduct when it is private, non-remunerative, and engaged in between mutually consenting adults. *Id.* at 578.

We note, however, that a party "has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights." *County Court of Ulster County v. Allen*, 442 U.S. 140, 154-55 (1979). In *Singson v. Commonwealth*, 46 Va. App. 724, 734, 621 S.E.2d 682, 686 (2005), we applied that language to a facial challenge to Code § 18.2-361(A) under the Due Process Clause and held that only an as-applied challenge was appropriate. We continue to hold, as previously stated in *Singson*, that nothing in *Lawrence* or the Supreme Court of Virginia's opinion in *Martin v. Ziherl*, 269 Va. 35, 607 S.E.2d 367 (2005), facially invalidates Code § 18.2-361(A). 46 Va. App. at 737, 621 S.E.2d at 688. As was the case in *Singson*, therefore, we will only consider the constitutionality of Code § 18.2-361(A) as applied to appellant's conduct. *See also Tjan v. Commonwealth*, 46 Va. App. 698, 621 S.E.2d 669 (2005) (citing *Singson* as preventing a facial challenge to Code § 18.2-361(A) on due process grounds).

B.

As-Applied Challenge

Appellant maintains that Code § 18.2-361(A) is unconstitutional as applied to him because Virginia

has established fifteen as the age of majority for consensual sexual acts and that, therefore, his oral sodomy with A.J. and L.F. was consenting behavior between adults entitled to due process protection under *Lawrence*.

Appellant cites the interaction of three different statutes to build his case. Code § 18.2-361(A), at issue in this case, reads, in pertinent part, "A. If any person . . . carnally knows any male or female person . . . by or with the mouth, or voluntarily submits to such carnal knowledge, he or she shall be guilty of a Class 6 felony . . . ." This provision, then, serves to outlaw the behavior at issue in this case between any parties, regardless of age or consent. Code § 18.2-63 prohibits the "carnal knowledge" of a child either thirteen or fourteen years old. The statute specifically includes within the term "carnal knowledge" oral sodomy in the manner present in this case. The third statute, Code § 18.2-371, declares that when a person eighteen or older "engages in consensual *sexual intercourse* with a child 15 or older not his spouse" that person has committed a misdemeanor. (Emphasis added).

Appellant contends that these statutes establish an age of consent of fifteen for sexual behavior in Virginia and that, therefore, sodomy involving people fifteen and older should be viewed as no different from sodomy involving those eighteen and older. In support, he notes that Code § 18.2-371 specifically refers to "consensual sexual intercourse," thus establishing both 1) people fifteen and older can consent to intercourse and 2) the statute does not apply to sodomy. He also notes that Code § 18.2-63 bans all intercourse and sodomy involving children younger than fifteen. Finally, he points out that Code

§ 18.2-361(A) has no age limitation whatsoever. Thus, for consent purposes, anyone age fifteen and older is an "adult" in Virginia with regard to sexual behavior. Drawing on this reasoning, appellant cites *Lawrence* for its protection of private, consensual behavior between adults as establishing the unconstitutionality of Code § 18.2-361(A) as applied to him.

Appellant errs, however, in his interpretation of the statutes as defining "adult." The Supreme Court of Virginia has established that determining the age of majority is within the power of the legislature. *Mack v. Mack*, 217 Va. 534, 537, 229 S.E.2d 895, 897 (1976). While Code § 18.2-371 allows for people aged fifteen to seventeen to consent to sexual intercourse, the statute itself still refers to those people as "children." Additionally, Code §§ 1-203, 1-204, and 1-207 together define "adult" as a person aged eighteen or more, unless a statute specifically provides otherwise. Code § 18.2-361(A) does not change this standard definition of "adult." Therefore, appellant's equation of the ability to consent to sexual intercourse with being an "adult" fails.[2]

Other jurisdictions presented with a similar argument, although in different contexts, have reached the same conclusion. In *United States v. Bach*, 400 F.3d 622, 629 (8th Cir. 2005), the Eighth Circuit rejected the argument that child pornography

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[2] Furthermore, the distinction between Code § 18.2-63 and the other statutes is not a dividing line between "adults" and "children" but between a Class 4 felony in the case of Code § 18.2-63, a Class 6 felony in the case of Code § 18.2-361(A), and a misdemeanor in the case of Code § 18.2-371. Appellant reads a different distinction into the statutes than actually exists.

was protected under the reasoning of Lawrence when the child at issue was over the age of consent to engage in the depicted behavior. *See also United States v. Scherr*, 400 F. Supp. 2d 843, 850 (D. Md. 2005) (adopting the reasoning of Bach). Similarly, the Supreme Court of Nebraska held that the *Lawrence* holding clearly does not apply to children, leaving states free to define people under age eighteen as children. *State v. Senters*, 699 N.W.2d 810, 817 (Neb. 2005).

Because Virginia still considers people aged sixteen or seventeen to be children, we must determine whether Code § 18.2-361(A) can constitutionally be applied to acts between an adult and a child, rather than between adults, as appellant wishes. Viewed in this posture, appellant's challenge necessarily fails.

The Supreme Court in Lawrence made quite clear that its ruling did not apply to sexual acts involving children. The Court specifically notes that "[t]he present case does not involve minors." 539 U.S. at 578. Instead, "[t]he case does involve two adults." *Id.* That its holding does not apply to minors is one of four exceptions to the Court's holding. The Supreme Court found that acts involving minors along with non-consensual acts, public conduct, and prostitution do not merit due process protection. *Id.* The Supreme Court of Virginia recognized the importance of these exceptions when it noted in Martin that "this case does not involve minors, non-consensual activity prostitution or public activity. . . . [S]tate regulation of that type of activity might support a different result." 269 Va. at 42-43, 607 S.E.2d at 371.

Other jurisdictions have found these stated exceptions to be situations where the behavior is not a protected liberty interest. *See North Carolina v. Whiteley*, 616 S.E.2d 576 (N.C. Ct. App. 2005) (upholding constitutionality of "crimes against nature" statute in situations involving minors, non-consensual acts, prostitution, and public acts); *North Carolina v. Oakley*, 605 S.E.2d 215 (N.C. Ct. App. 2004) (holding Lawrence did not prohibit admission of evidence of defendant's homosexuality in case involving prosecution under a sodomy statute for contact with a minor); *Ohio v. Freeman*, 801 N.E.2d 906 (Ohio Ct. App. 2003) (finding no constitutionally protected right to engage in incest with adult daughter under *Lawrence*); *Washington v. Clinkenbeard*, 123 P.3d 872 (Wash. Ct. App. 2005) (upholding statute preventing sexual contact between school employee and student aged sixteen or older).

Furthermore, we have cited the exceptions noted in *Lawrence* to uphold the constitutionality of Code § 18.2-361(A) in other settings. In *Singson*, we found this same law constitutional in affirming the conviction of a man accused of *public* sodomy based on the public acts exception in Lawrence, 46 Va. App. at 738, 621 S.E.2d at 688. In keeping with our decision in *Singson*, we conclude that Code § 18.2-361(A) is constitutional as applied to appellant because his violations involved minors and therefore merit no protection under the Due Process Clause.

Affirmed

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**UNITED STATES COURT OF APPEALS**

**FOR THE FOURTH CIRCUIT**

No. 09-7973 (1:08-cv-00781-GBL-TRJ)

WILLIAM SCOTT MCDONALD, a/k/a MacDonald,
Petitioner-Appellant,

v.

GENE M JOHNSON, Director Virginia Department of Corrections,
Respondent-Appellee.

**FILED: July 27, 2010**

ORDER

The Court denies the petition for rehearing.

Entered at the direction of the panel: Judge Motz, Judge King and Senior Judge Hamilton.

For the Court

/s/ Patricia S. Connor, Clerk